



Thomas M. Gould
Clerk of Court

FILED BY whe D.C.

**United States District Court
Western District of Tennessee**

05 AUG - 1 PM 3:44

THOMAS M. GOULD
CLERK, U.S. DISTRICT COURT

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August 1, 2005

Leonard Green, Clerk
U.S. Court of Appeals for the Sixth Circuit
Potter Stewart U.S. Courthouse
100 East Fifth Street, Room 532
Cincinnati, OH 45202-3988

**Re: *United States v. Melissa Campbell Rabaglia*
 Circuit Court Case No. 04-5878
 *District Court Case No.03-20107-B***

To the Clerk:

Enclosed please find transmittal of Defendant Melissa Campbell Rabaglia's "MOTION TO DECLARE DEFENDANT INDIGENT FOR PURPOSES OF APPEAL ONLY" filed in this U.S. District Court on July 9, 2004. It should be treated for filing and docketing purposes as serving as Defendant Rabaglia's timely Notice of Appeal in the above matter.

I have determined that this July 9, 2004 motion is the functional equivalent of a Notice of Appeal under Fed. R. App. P. 3(c), a determination that I have made pursuant to an Order and instructions from the Sixth Circuit Court of Appeals, a copy of which Order is attached hereto.

The basis of my determination is that this MOTION suffices as the Defendant's Notice of Appeal because the contents of the Notice of Appeal, as set forth under Rule 3 (c), have been expressly or constructively satisfied: (A) the specific party taking the appeal has been identified; (B) the judgment or order being appealed is identified by case number; and (C) while the name of the court to which the appeal is taken might not have been specifically identified, there is only one court to which this appeal could be taken. Moreover, in determining the adequacy of the contents of a Notice of Appeal it is generally held that so long as the function of notice has been met by the filing of a document indicating the intention to appeal, the substance of the rule has been complied with. Finally, in proceedings following the July 9, 2004 MOTION, court staff and judicial personnel treated her case as though it was an ongoing appeal, suggesting thereby that the purpose of filing her Notice of Appeal has been satisfactorily met.

Respectfully submitted,

Thomas M. Gould

Attachments: (1.) July 9, 2004 Motion and (2.) July 25, 2005 Order

147

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

FILED 04 JULY 9 PM 3:37
04 JUL -9 PM 3:37

UNITED STATES OF AMERICA

ROBERT J. DE TROLO
CLERK, U.S. DIST. CT
W.D. OF TN, MEMPHIS

v.

No. 03-cr-20107-Breen

MELISSA CAMPBELL RABAGLIA

**MOTION TO DECLARE DEFENDANT INDIGENT FOR
THE PURPOSES OF APPEAL ONLY**

COMES NOW the Defendant, Melissa Campbell Rabaglia, by and through her counsel of record, Leslie I. Ballin, and would respectfully request that she be declared indigent for the purposes of appeal only. In support of her request, Defendant would state that she due to her indigency, she is unable to bear the cost of an attorney for the purposes of appeal.

WHEREFORE PREMISES CONSIDERED, the Defendant, Melissa Rabaglia, prays she be declared indigent by this Honorable Court and that this Court appoint counsel to her for the purposes of appeal in this cause.

Respectfully submitted,


BALLIN, BALLIN & FISHMAN, P.C.
Leslie I. Ballin, Esq.
200 Jefferson Avenue, Suite 1250
Memphis, Tennessee 38103
(901) 525-6278

Attorney for Defendant

(131)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served upon Tracy Berry, Assistant United States Attorney, 167 North Main Street, 8th Floor, Memphis, TN 38103; via facsimile and/or United States mail, first class postage prepaid, this the 8th day of July, 2004.



UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

100 EAST FIFTH STREET, ROOM 540

POTTER STEWART U.S. COURTHOUSE

CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

PATRICIA J. ELDER

(513) 564-7034

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05 JUL 27 AM 11:21

THOMAS M. GOULD
CLERK, U.S. DISTRICT COURT
W/D OF TN, MEMPHIS

Filed: July 25, 2005

Stephen B. Shankman

Camille R. McMullen

RE: 04-5878
USA vs. Rabaglia
District Court No. 03-20107

Dear Counsel:

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,
Leonard Green, Clerk


(Ms.) Patricia J. Elder
Senior Case Manager

Enclosure

cc: Honorable J. Daniel Breen
Mr. Thomas M. Gould

146

No. 04-5878

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

JUL 25 2005

UNITED STATES OF AMERICA,

)

Plaintiff-Appellee,

)

v.

)

MELISSA CAMPBELL RABAGLIA,

)

Defendant-Appellant.

)

O R D E R

LEONARD GREEN, Clerk

Chief Judge

Guest:

LEONARD GREEN, Clerk

By: Patty Elder
Deputy Clerk

Before: BOGGS, Chief Judge; BATCHELDER, Circuit Judge; GADOLA, District Judge.*

The defendant was convicted of conspiracy to steal mail and possession of stolen mail on June 2, 2004. On June 29, 2004, she filed a motion for an extension of time to appeal. The district court granted her motion on June 30, 2004, and extended the time for the defendant to appeal to July 14, 2004. On July 9, 2004, the defendant moved to be declared an indigent for the purposes of taking an appeal. Her motion was granted, and the defendant filed a notice of appeal on July 19, 2004. The government now moves to dismiss the appeal as late. The defendant has not filed any response to the motion to dismiss.

Rule 4(b)(1)(A), Fed. R. App. P., provides that a defendant in a criminal proceeding has ten days from the later of the entry of judgment or the filing of an appeal by the government in which to file a notice of appeal. Although the district court extended the time to appeal in this case until July 14, the defendant did not file her notice of appeal until July 19. The time limit for filing a notice of

*The Honorable Paul V. Gadola, United States District Judge for the Eastern District of Michigan, sitting by designation.

No. 04-5878

- 2 -

appeal is mandatory and jurisdictional, and the failure of a defendant to file a timely notice of appeal deprives this court of jurisdiction. *United States v. Guardino*, 972 F.2d 682, 685 (6th Cir. 1992); *United States v. Wrice*, 954 F.2d 406, 408 (6th Cir.), *cert. denied*, 504 U.S. 945 (1992). The July 19 notice of appeal was late, and the government's motion to dismiss must be granted.

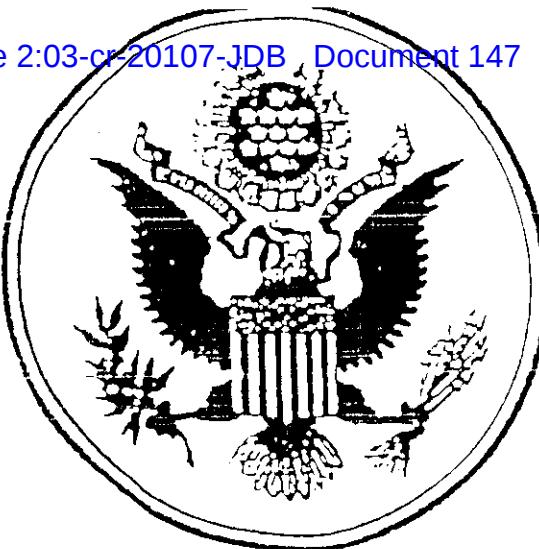
However, the defendant's July 9 motion to be declared indigent was filed within the extension of time to appeal granted by the district court. If the motion is the functional equivalent of a notice of appeal, *see Smith v. Barry*, 502 U.S. 244, 248 (1992); *United States v. Christoph*, 904 F.2d 1036, 1040 (6th Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991), this court may have jurisdiction to review the defendant's conviction.

The government's motion to dismiss is **GRANTED**. The clerk of the district court is directed to determine if the defendant's July 9 motion is the functional equivalent of a notice of appeal. If the motion complies with the requirements of Fed. R. App. P. 3(c), the clerk should transmit the July 9 motion to this court for docketing as an appeal by the defendant.

ENTERED BY ORDER OF THE COURT

Leonard Greenberg
Clerk

10/08/01/05 Page 7 of 9 PageID 175
Robert K. Di Trolio, Clerk



U.S. DISTRICT COURT

WESTERN DISTRICT OF TENNESSEE

Room 242, Federal Building
157 N. Main Street
Memphis, TN 38103

901-495-1206 RECORDS

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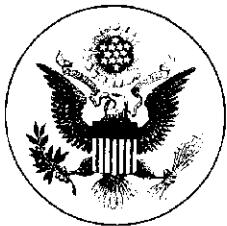
To: Patricia Elder
Fax No. 513-564-7096
From: EARLINE GEMYER
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Time:
Comments: RE: Melissa Campbell Rabaglin
03-20107 (04-5878)

No. of Pages (including this cover page): - - - 3

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Notice of Distribution

This notice confirms a copy of the document docketed as number 147 in case 2:03-CR-20107 was distributed by fax, mail, or direct printing on August 2, 2005 to the parties listed.

PDA
FEDERAL PUBLIC DEFENDER
200 Jefferson Ave.
Ste. 200
Memphis, TN 38103

Tracy Lynn Berry
U.S. ATTORNEY'S OFFICE
167 N. Main St.
Ste. 800
Memphis, TN 38103

Honorable J. Breen
US DISTRICT COURT